JD(NY)–11—03
New York, NY

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH

PEARL PAINT CO., INC.

and Case No. 2—CA—34478

LOCAL 169, UNION OF NEEDLETRADES, INDUSTRIAL
& TEXTILE EMPLOYEES, AFL-CIO

Joane Si Ian Wong, Esq., and Leah Jaffe, Esq.,
for the General Counsel.
Jeffrey P. Englander, Esq., of Morrison, Cohen, Singer & Weinstein, LLP, New York, New York, for the Respondent.
Stuart Lichten, Esq., of Kennedy, Schwartz & Cure, P.C., New York, New York, for the Charging Party.

DECISION

Statement of the Case

MICHAEL A. MARCIONESE, Administrative Law Judge. I heard this case in New York, New York on October 2, 3 and 10, 2002. Local 169, Union of Needletrades, Industrial & Textile Employees, AFL-CIO ("the Union" or "UNITE") filed the charge on March 27, 2002 and amended it on May 8, 2002.[1] The complaint issued, based upon the charge as amended, on June 28. The complaint, as amended at the hearing, alleges that Pearl Paint Co., Inc., the Respondent, discharged its employee Nicholas Slight on March 12 in violation of Section 8(a)(1) and (3) of the Act. The amended complaint also alleges independent violations of Section 8(a)(1) of the Act allegedly committed by the Respondent's Maintenance Manager Dale O'Connor during a union organizational campaign in October and November 2001. The Respondent filed its answer on July 11, denying that it committed the unfair labor practices alleged and asserting, as an affirmative defense, that all actions taken against Slight were for legitimate business reasons unrelated to any union activity in which he may have engaged.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, the Respondent and the Charging Party, I make the following

[1] All dates are in 2002 unless otherwise indicated.

Findings of Fact

I. Jurisdiction

The Respondent, a corporation, is engaged in the retail sale of art supplies at various locations in the New York metropolitan area. The Respondent annually derives gross revenues in excess of $500,000 from its operations in New York and purchases and receives at its New York facilities goods and services valued in excess of $50,000 directly from points outside the State of New York. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. *The Evidence*

The Respondent is a discount retailer of art supplies with its main New York store located at 308 Canal Street. Behind the Canal Street store are three specialty boutique stores at 42, 56 and 58 Lispenard Street.[2] The Respondent also has a store located at 207 East 23rd Street, near the School of Visual Arts. Prior to 2002, the Respondent also had a warehouse at 52 Walker Street, in the vicinity of the Canal Street stores. In addition to the New York City facilities, the Respondent had stores and offices in Woodbridge, New Jersey and on Long Island. The Respondent's corporate headquarters is in Florida.

In mid-August, 2001, the Union began an organizing drive among the Respondent's employees at the New York City stores. The Union filed a petition with the Board seeking to represent these employees on October 29, 2001 and an election was held on November 29, 2001 pursuant to a stipulated election agreement. It appears from the evidence that the Respondent waged a vigorous campaign to convince its employees that they did not need a Union. The General Counsel offered into evidence campaign literature distributed by the Respondent to its employees. Although the Respondent's opposition to the Union is clear, the literature itself is innocuous and contains no statements that would violate the Act. Despite the Respondent's campaign, The Union did prevail at the election and was certified on February 6.[3] The parties commenced negotiations for their first collective-bargaining agreement in April and reached agreement in May on a contract to become effective June 2. The allegations in this case involve the Respondent's March 12 termination of Nicholas Slight, an employee in the maintenance department who supported the Union during the campaign.

Scott Northrup[4] was the Respondent's Store Manager with overall responsibility for the New York City facilities at the time of the Union campaign. Northrup left the Respondent's employ in May and was succeeded by Dinah Alderman Rengel who had been the assistant Store Manager since August 2001 and had acted as the Store Manager from February to May while Northrup reduced the amount of time he spent at the store. Dale O'Connor has been in

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[2] The transcript at several places incorrectly identifies the address of these stores as on "West Bernard Street." I hereby correct the transcript to reflect the correct street name.

[3] The record does not reveal why it took more than two months for the certification to issue. The most likely reason would be that there were challenges or objections that had to be resolved.

[4] The transcript incorrectly identifies this individual, in several places, as "Scott Northweld". I shall hereby correct the transcript to correct this obvious error.

charge of the Respondent's Maintenance Department for approximately 14 years. He is responsible for all janitorial, repair and general maintenance activities at the New York City stores. The maintenance department office is located in the basement of 58 Lispenard Street. When the Union campaign commenced, there were 5 employees, including O'Connor, in the maintenance department: Gowtam Ghooray, referred to in the record as "Lal", the assistant maintenance supervisor and an admitted supervisor within the meaning of the Act, janitors Michael Piche and Richard Govan, and Slight, the handyman.

Slight testified that he attended union meetings beginning after September 11, 2001, that he signed a union authorization card on October 11, 2001 and that he distributed about 8-10 cards to other employees. Christina Hassinger, a former employee of the Respondent who is now employed by the Union and was the lead organizer during the campaign, testified that she regularly met with Slight outside the Canal Street store during the campaign. Slight testified that, on one occasion when he was speaking to Hassinger outside the store, Northrup paged him and told him that he didn't want Slight talking to the Union "on company time". According to Slight, he told Northrup that he was sorry and that it wouldn't happen again. Hassinger was not asked about this incident during her testimony. Northrup was not called as a witness by any party in this proceeding.

Slight testified further that he was given a hat with the Union's logo and wore it "all day, every day", in front of the store manager, assistant store manager and every one else in management except his boss, O'Connor. He volunteered, without being asked, that he refrained from wearing the hat in front of O'Connor because he knew if he did, he would be fired. According to Hassinger, the Union gave these hats out to the Respondent's employees on November 27, designated as "hat day", and asked employees to wear them as a show of solidarity. Despite Slight's assertions that he attempted to conceal his union support from O'Connor, O'Connor acknowledged seeing Slight wearing a union hat in October-November, 2001. In fact, according to O'Connor, it was Slight who first told him that union representatives were in the store talking to employees in late August or early September.

There is no dispute that O'Connor discussed the Union with the employees in his department while they were having breakfast in the maintenance office sometime in early October. O'Connor testified that he spoke to the employees after meeting with Northrup. According to O'Connor, he relayed to the employees the information he had received from Northrup about the Union's organizing drive. He told the employees that, based on his conversations with Northrup, the maintenance employees, security, the business office and warehouse would not be allowed to be part of the Union. He testified further that he told the employees this because of his belief that, because the Union was a textile union, it could not represent them.[5] Although Slight was present for the meeting, the General Counsel did not ask him about it. In response to questions from Charging Party's counsel, Slight recalled being at such a meeting with O'Connor and the rest of the department and recalled O'Connor saying that he did not want the employees in his department to be part of the Union. Slight continued testifying that O'Connor also told the employees that "he would give a dollar (raise) and the Union would give 25 cents and it would make the Union rich and we poor." In earlier testimony, Slight had indicated that this same statement was made by O'Connor in a different conversation, to be discussed later. The General Counsel did ask former employee Piche about

[5] Applying this logic, O'Connor would also have concluded that the Union wouldn't be able to represent the sales employees who make up the bulk of the Respondent's workforce. O'Connor did not explain his faulty reasoning.

this breakfast meeting in the maintenance department.[6] Piche recalled that O'Connor said "his maintenance men wouldn't be in the Union and his maintenance department didn't need a union." When asked if O'Connor said anything else, Piche replied, "just to the fact he didn't want his men in the Union. That's all." Finally, when asked yet again if O'Connor said anything else, Piche recalled that O'Connor said that "the company would do good for us and everything else." Piche testified further, in response to questions from Charging Party's counsel, that he and Slight spoke up at this meeting, taking issue with O'Connor's claim that the Respondent would "do good" for the employees. It is somewhat surprising that Slight would respond to O'Connor in light of Slight's avowed efforts to conceal his support for the Union from O'Connor for fear of being fired "on the spot." Lal, O'Connor's assistant and an admitted supervisor, testified about this meeting for the Respondent. He recalled that O'Connor told the employees that he had heard from Northrup that the Union was coming but that he (O'Connor) wasn't sure if maintenance, security and the business office would be included because it was a textile union.

The Union campaign coincided with the Respondent's decision not to renew its lease for the space on Walker Street and to relocate the warehouse which had occupied that space to vacant space at a facility the Respondent owned in Woodbridge, New Jersey. O'Connor was put in charge of the warehouse relocation. According to O'Connor, this involved converting the vacant space in New Jersey from office space to warehouse space, dismantling the warehouse at Walker Street and moving its contents to New Jersey. O'Connor began spending most of his time in New Jersey, supervising the demolition of the office space and its reconstruction as a warehouse in October 2001. By November 2001, he also began transporting inventory from Walker Street to New Jersey, using rented trucks. The movement of goods to the new warehouse continued into January. O'Connor continued to spend most of his time in New Jersey until the time of Slight's termination in March. Although the amount of time he was required to spend away from the Canal Street locations declined over time, O'Connor did not complete his work in New Jersey until May. O'Connor estimated that during the most relevant period, from October, 2001 to March, 2002, he spent about 90 – 95% of his time away from Canal Street.

During O'Connor's absence, Slight worked independently as the sole handyman for the Canal Street locations. He received his work assignments from O'Connor either by phone, or during meetings on Monday mornings when O'Connor had to go to Canal Street to open the store.[7] O'Connor also interacted with Slight during November and December when Slight accompanied him on several trips to New Jersey to move stock to the new warehouse space. According to Slight, on two of these trips, the subject of the Union was discussed. Slight testified that, on both of these occasions, he and O'Connor were accompanied by Kenny Hooks, who was the warehouse manager on Walker Street. These two occasions were, according to Slight, the only times that all three men were in the same truck at the same time. O'Connor denied several times during his testimony, with absolute certainty, that Hooks ever rode in the same truck with him and Slight. Hooks contradicted this testimony when he appeared as a rebuttal witness for the General Counsel. O'Connor denied ever talking about the Union during his trips to and from New Jersey with Slight. Hooks also contradicted O'Connor in this regard. However, as will be shown, Hooks did not entirely corroborate Slight about these incidents.

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[6] Piche was terminated by the Respondent in early March, shortly before Slight's termination. The parties stipulated that an unfair labor practice charge filed by the Union alleging that Piche's termination violated Section 8(a)(3) of the Act was dismissed by the Regional Director, after an investigation.

[7] Lal ordinarily opened the buildings during O'Connor's stint in New Jersey. O'Connor had to do this on Monday because that was Lal's day off.

Slight's testimony regarding these key conversations, which form the basis of unfair labor practice allegations and are relied upon by the General Counsel to prove animus, was not the height of clarity. At times, he appeared to confuse the two conversations and it was difficult to determine what was said in each conversation. In addition, because of Slight's tendency to editorialize during his testimony, adding opinion and speculation, it was difficult to decipher what was said, as opposed to what Slight interpreted or assumed was meant by statements that were made. Slight testified that, during the first conversation, O'Connor asked Hooks how he felt about the Union. According to Slight, Hooks responded, "I don't know, how do you feel", to which O'Connor said he didn't like it. Slight testified that he also told Hooks that he would like to keep the maintenance department away from the Union. Slight testified that the conversation continued between O'Connor and Hooks and that O'Connor gave his reasons for not liking the Union. When asked what those reasons were, Slight testified that, in the second conversation, O'Connor told Hooks he didn't like the Union because unions are up to no good, that the Union wouldn't give the raise that he gives, that he gave a dollar and the Union only gave a 25 cent raise.[8] Slight testified that the conversation continued between O'Connor and Hooks until O'Connor turned to Slight and asked if he was part of the Union. Slight testified that he responded, "no, I was already in a union", meaning a union different than UNITE. According to Slight, O'Connor said, "oh" and continued his conversation with Hooks. On cross-examination, Slight testified that, when O'Connor asked Hooks what he thought about the Union, Hooks expressed his opinion in favor of the Union representing the Respondent's employees. Although he testified that the conversation between O'Connor and Hooks went "on and on", he could not recall anything else said and he was unable to differentiate between the two conversations. Slight testified that the only time during these two conversations he spoke was when O'Connor asked him directly if he was participating in the Union. On further cross-examination, Slight testified that O'Connor asked him if he was part of the Union more than once and volunteered that, on one occasion, he told O'Connor, "it's good that a Union is coming in because the Union will … look out for the employees. There will be better health care and there will be more pay." When asked if O'Connor said anything in response to this, Slight testified that O'Connor simply dropped the subject. On re-direct, Slight testified for the first time that O'Connor asked him if he was in the Union two or three times.

As noted above, O'Connor denied ever talking to Slight about the Union during road trips to New Jersey and denied ever expressing his opinion on the subject of unionization. Hooks, who was terminated by the Respondent when the Walker Street warehouse closed because he and the Respondent were unable to agree on the terms of his transfer to the new location, testified that he went to New Jersey in the truck with O'Connor and Slight only one time. On other occasions that he helped transport stock to the new warehouse, he drove a separate truck. Hooks testified that there was only one conversation between him and O'Connor about the Union in Slight's presence. This conversation occurred during a stop to refuel at a gas station in New Jersey. According to Hooks, O'Connor asked him what he thought of the Union. Hooks testified that he told him "it was twofold", it could work in favor of the employees or it could work against them. Hooks recalled O'Connor replying that he "figured it wouldn't be in the best interest for anyone to join the Union." Hooks testified that O'Connor then turned to Slight and said, "you're not joining the Union, right?" According to Hooks, Slight did not give a direct answer, but "talked around the question." When asked if O'Connor said anything else, Hooks testified "not on that particular day." When asked a leading question by General Counsel, Hooks recalled that O'Connor did talk about the difference between company and Union raises on

[8] As previously noted, this is the same statement he attributed to O'Connor during the breakfast conversation in the maintenance office in early October.

another occasion, during a one-to-one conversation between the two supervisors. Hooks recalled that O'Connor referred to employees at the Respondent's facility on Long Island who were covered by a union contract. Hooks testified that he and O'Connor had two or three other conversations about the Union, but neither Slight nor any other employee was present for these conversations. According to Hooks, in one conversation, O'Connor asked if anyone on Hooks' staff was taking part in the Union and Hooks said he didn't know, and that the employees were entitled to use their own discretion. O'Connor said nothing in response to Hooks' statement. On another occasion, according to Hooks, O'Connor told him that he felt strongly that the Union wasn't a good idea and asked Hooks if he thought the Union would prevail. Hooks told O'Connor he had no idea. On cross-examination, Hooks denied that he told O'Connor, in Slight's presence, that he was in favor of the Union coming in, or that he thought it was a good thing.

Piche testified that he had two conversations with O'Connor about the Union before the election. Both of them occurred in the compactor room. Slight was present for only one of them. According to Piche, O'Connor told him, during both conversations, that he didn't want his men in the Union and that the Union wouldn't do the employees any good. After the General Counsel used Piche's pre-trial affidavit to refresh his recollection, Piche recalled O'Connor telling him that he shouldn't wear the Union hat and badges. Although in his affidavit he had stated that he was wearing the hat at the time of the hearing, he could not recall at the hearing whether or not he was. When questioned by Charging Party's counsel, Piche testified that he was alone with O'Connor when he was told not to wear the Union hat and that he responded to O'Connor by referring to a memo from Store Manager Northrup which stated that employees were permitted to wear the Union hat on election day. Piche testified that this conversation occurred the day of the election. According to Piche, the conversation at which Slight was present occurred about a week before the election and that O'Connor said "basically the same thing, that he didn't want his workers in the Union and he didn't want his maintenance department in the Union." Piche testified that he responded to O'Connor by saying that the employees had no protection without a union. When asked if Slight said anything, Piche testified that Slight "basically backed up everything I said." Slight testified that he was present in the compactor room when O'Connor told Piche to take off the Union hat and that Piche refused, telling O'Connor that Northrup had given employees permission to wear the hat during the election time. Although O'Connor denied that he ever told Slight not to wear a Union hat or badge, he did not specifically dispute Piche's testimony regarding the conversations in the compactor room.

In late January and early February, the Union distributed copies of its magazine, the *Nor'Easter,* to the Respondent's employees. The cover of the magazine proclaimed "Victory at Pearl Paint" and highlighted a story on page 3 about the Respondent's employees. Slight was one of a number of employees featured in that article, which included his photograph and a quote in which he listed a number of grievances regarding the Respondent's employment practices, compensation and benefits and stated his reason for wanting union representation. Hassinger testified that she passed out the magazine outside the doors where employees enter and leave work over a four-day period beginning January 29. She recalled handing one to James Duhaney, the Respondent's Assistant Manager in the warehouse whom the parties stipulated was a supervisor. O'Connor denied seeing the magazine, and in particular Slight's picture and quote, before Slight's termination.

Slight testified that, about 3 or 4 days before he was terminated, Lal, the Assistant Maintenance Manager, told Slight he had heard that Slight appeared in the Union paper. When Slight confirmed he had, Lal asked what did Slight say in the article. Slight repeated his quoted remarks to Lal and Lal asked him to bring in a copy of the magazine. Slight told Lal he would. Although Slight did bring in a copy of the *Nor'Easter* to give to Lal, Lal did not ask him for it

again and Slight never gave him the copy he had brought to work. Lal denied seeing the *Nor'Easter* before Slight's termination and denied speaking to Slight about his appearance in that publication. Hooks, who was an admitted supervisor, testified that he saw the magazine with Slight's picture and quote and that he even joked about it with Slight. According to Hooks, this occurred before the election on November 29. Hooks apparently had confused the copy of the *Nor'Easter* which included Slight's picture and quote with other Union literature that was distributed before the election. It would have been impossible for Hooks to have seen this publication before the election because the article describes the Union's victory in that election. It is also highly unlikely that Hooks even saw this issue of the magazine before he left his employment with the Respondent because he testified that his last day was in the second or third week of January and Hassinger testified that she did not begin handing the magazine out to the Respondent's employees until January 29.

Slight testified that the day he was fired began with O'Connor asking him, "where's the drill?"[9] Slight told O'Connor the drill was in the office, charging. O'Connor told him it was not there and told Slight to look for it. Slight testified that he looked all over for the drill but could not find it.[10] When he reported this back to O'Connor, O'Connor asked him where's the ladder. Slight told O'Connor the ladder is supposed to be in the back. O'Connor told him to go look for it. Slight testified that the ladder was not where it was supposed to be so he returned to O'Connor and told him that he had loaned the ladder to a contractor who was putting in a new air conditioning unit on the roof. O'Connor told him to check the roof and see if the ladder was there. Slight went up to the roof and did not find the ladder. When he reported to O'Connor that he could not find the ladder, O'Connor asked him where another tool was.[11] According to Slight, he told O'Connor he didn't know where this last tool was although he knew at the time that Lal had taken it home to use on a personal project. Slight testified that Lal told him not to tell O'Connor that he had taken the saw home.[12] After this last request, O'Connor told Slight he was incompetent and fired him. According to Slight, as he was leaving, O'Connor said to him, "let me see what the Union will do for you." Slight testified that he told O'Connor before leaving the store that he was going to file for unemployment and he asked O'Connor not to "mess it up" for him. O'Connor replied, "well, you do what you have to do and I will do what I have to do."[13]

O'Connor testified that he terminated Slight for incompetence as a result of two incidents that occurred on his last day of employment. According to O'Connor, he had been asking Slight about the whereabouts of the screw gun for several days and, each time, Slight told him he had looked all over for it but could not find it. On the day in question, Lal reported to O'Connor that he had found the screw gun sitting on a shelf in the tool room. Later that morning, while

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[9] On cross-examination, Slight said O'Connor asked him for the "screw gun". When this discrepancy was pointed out, he said a drill and a screw gun are the same thing. Later, he clarified his testimony to say that, while they are distinct tools, they are used for the same purpose. Slight never did clarify precisely which tool it was that O'Connor first asked him to find.

[10] On cross-examination, Slight testified that, at the end of his search, he found the drill/screwgun in the tool room and brought it to O'Connor, telling him that O'Connor is the only one who could have put the drill/screwgun in the tool room.

[11] It is unclear from the transcript precisely which tool Slight testified on direct he was asked about. It was either a sawzall, or a jigsaw. On cross-examination, Slight referred to it as a jigsaw. At other points in his testimony he also referred to the missing tool as a table saw.

[12] On cross-examination, Slight testified that the ladder was the last thing O'Connor asked him to find, after the drill/screwgun and jigsaw/sawzal/tablesaw.

[13] Slight in fact applied for and received unemployment compensation after his termination. Slight did not know whether the Respondent contested his claim.

O'Connor was talking to Slight about his inability to find the screwgun, Lal came into the office and told O'Connor he needed the ladder to change a light bulb. Lal asked, "where's the ladder?" According to O'Connor, he had authorized Slight to loan the ladder to the air conditioning contractor a few weeks earlier. He and Lal then asked Slight where was the ladder. When Slight said he didn't know, O'Connor questioned him why he didn't make sure the contractor returned the ladder. Slight didn't have an answer. Lal, who was present throughout the hearing and heard O'Connor's testimony, corroborated his account of Slight's last day of employment. According to O'Connor, he decided as a result of the incidents involving the screwgun and the ladder to terminate Slight for incompetence, considering his inability to keep track of these tools in the context of a number of other incidents that had occurred throughout Slight's employment, including some for which he had already received discipline.

O'Connor testified that, within an hour of terminating Slight, he prepared the first of two Separation Notices to document the termination. On the first, dated March 13, O'Connor checked the box for "unacceptable performance" as the reason for termination. In the section entitled "Remarks", O'Connor wrote:

> Nick cannot keep track of the tools. He cannot follow instruction. He does not remember most things. It has gotten too difficult to work with him.

In the "Final Employee Evaluation" section of the form, O'Connor oddly checked the outstanding box for reliability, attendance, independence, initiative, adherence to policy, judgment and supervisory skills, and the satisfactory box for quality, productivity, job knowledge, creativity and interpersonal relationships. O'Connor did not rate Slight as unsatisfactory on any criteria. However, in the remarks to this evaluation, O'Connor wrote: "Nick has been spoken to several times. His performance is not getting better."

When confronted with the glaring inconsistency between this final evaluation of Slight and the act of termination, O'Connor explained that he prepared the first separation notice in a hurry, without thinking about the boxes he checked. Although he claimed the narrative comments were accurate, he believed he was distracted by a phone call or some other interruption and did not pay much attention to the evaluation portion of the form. According to O'Connor, he put the first Separation Notice aside for a few days and, when he looked at it again, realized he had made a mistake. At that point, he prepared the second Separation Notice, which is dated March 15. This second document, which apparently was not provided to the General Counsel until shortly before the hearing, contains a much more negative "final employee evaluation". In this one, O'Connor checked unsatisfactory for all criteria except creativity, initiative and interpersonal relationships, on which he checked satisfactory. Unlike the first separation notice, O'Connor checked "No" in response to the question "Would you rehire?". O'Connor also checked "other" as the reason for termination, writing "incompetence. More comments on other side." There are no other remarks on the face of the form. On the reverse side, however, O'Connor wrote the following lengthy explanation for his action:

> I have been verbally warning Nick that he needed to pay more attention to my instructions. When I ask him to do something he should write it down. I asked Nick to take the basketball hoop down that was mounted on the loft. Nick took down the loft. I came back from NJ one day Nick was sitting down in the maintenance office smoking a cigarette. I told him that he was never to hang out in the office. His excuse was "I did not expect you to come." The new drill went missing I asked Nick to look for the new drill. About a week later Mot needed to get something from the tool closet. He went in the drill was right there. Nick never looked. Nick loaned the ladder to a service man that came to fix our A.C. We have not seen it since. He

> should have made sure that it was put back. Nick did things his own way never listened to instruction. Nick would tell me that he was an electrician. I would tell Nick that he was only to do minor electric work and he needed to discuss it with me first. One day Nick called me in NJ to ask me if he should fix the lights on the 1st floor. He explained that he would hook them up with another circuit on the floor. I said No, No, No. That would overload the other circuit. Anyway it was not his job, I have a licensed electrician coming in to fix the light problem. Nick did not listen. He went ahead and overloaded the other lights on the floor. All the lights blew out. Nick was also told not to fix the up/down switch on the lift. I had called our electrician and was waiting for him to come in. Nick did not listen to me. He went ahead and did it.

O'Connor did not discard the first separation notice. Instead, he placed both in Slight's personnel file.

At the hearing, O'Connor testified that there were numerous examples of Slight's "incompetence" throughout his employment. O'Connor had identified several of these in a pre-trial affidavit taken by the Board's investigator. The first three were also cited in the second separation notice prepared by O'Connor on March 13, i.e. the basketball hoop/loft incident which occurred in late November/early December, 2001; Slight's overloading the circuits when he "fixed" the display lights on the first floor despite O'Connor's instructions not to, which occurred in December, 2001; and Slight's repair of the hydraulic lift, again contrary to O'Connor's instructions, which occurred in October. In the affidavit, O'Connor also described an incident in December, 2001 in which Slight knocked down a wall as part of conversion of unused office space to a lunch room and, in the process, cut phone, cable and electrical wires. O'Connor conceded that he did not terminate or discipline Slight for any of these incidents, despite the apparent seriousness of them.

When asked about these particular incidents, Slight did not dispute O'Connor's account of the alleged errors on his part. For example, he admitted being told not to fix the hydraulic lift because O'Connor had already arranged to have the vendor make a service call to repair the problem. Although there is no dispute that Slight repaired the lift satisfactorily, the Respondent incurred a charge for the service call that was not needed. Slight also admitted being instructed to take down the basketball hoop attached to the loft and that he took down the entire loft instead. He never did explain how this came to be. Slight also acknowledged that at least some lights went out on the first floor when he tried to fix the display lights but claimed he did this because Store Manager Northrup overrode O'Connor's instructions and told him to fix it. Finally, Slight reluctantly admitted cutting through the phone, cable and electrical wires when he took the wall down but, again, blamed Northrup. According to Slight, Northrup told him to do whatever it took to get the room ready for a Christmas party, including taking the wall down without ensuring there were no wires, etc. that would be damaged. The Respondent incurred significant expense repairing the aftermath of Slight's work on the last two projects in December. Slight also corroborated O'Connor's testimony that O'Connor gave him a notebook, when O'Connor started working in New Jersey, so Slight could write down O'Connor's instructions. However, Slight claimed that O'Connor told him the purpose was to remind O'Connor what he had told Slight, not the other way around.

In addition to these incidents, which were referred to in the March 15 separation notice and O'Connor's affidavit, Slight received written discipline for other incidents that had not been previously mentioned. On December 17, 2001, O'Connor gave Slight a written warning for "failure to follow instructions" on December 16. O'Connor described the incident as follows in the warning notice:

> I gave Nick specific instruction to build a 7' rack, move stock and tables and bring over 44 beams from Walker St. on Sunday. None of these instructions were carried out. No attempt to contact me if there was a problem.

O'Connor wrote further, "This problem is ongoing. It will be corrected immediately, or I will follow up with another warning." Again, Slight did not deny that he did not complete this assignment. Slight's explanation, written on the warning notice and testified to at the hearing, was that the warehouse employees whom O'Connor said would help Slight with this work refused to do so. Although Slight testified that he did call O'Connor to advise him of this, he did not mention this in his response on the warning notice. Moreover, he did not testify to any response from O'Connor when he assertedly told him that the warehouse employees refused to help him.

Slight also received two warning notices that were prepared and signed by Lal, at O'Connor's direction. The first, dated January 3, is for absenteeism. The second, dated February 12, involves the incident when O'Connor found Slight smoking in the office. This latter notice also accused Slight of letting temporary employees work through lunch. Slight did not deny smoking in the office but defended himself by claiming that O'Connor also smoked in the office. Slight denied that he told the temporary workers to work through lunch. With respect to the absenteeism, Slight explained that he missed work after becoming ill from breathing in dust while cleaning up the vacant warehouse space. According to Slight, Northrup told Slight to go home when he saw how sick he was. Lal testified that he had no personal knowledge of the incidents for which he wrote up these warnings but did so at O'Connor's instructions.

All of the incidents illustrating Slight's "incompetence" occurred during the period when O'Connor was spending virtually all of his time in New Jersey coordinating the relocation of the warehouse from Walker Street to Woodbridge. These incidents also coincided with the Union campaign and its aftermath. Although O'Connor did not cite any specific examples of Slight's incompetence occurring before October, the written performance evaluation he gave Slight on August 17, 2001, at the end of his probation period, provides some hint of what was to come. O'Connor gave Slight an overall rating of "good", but noted several areas where Slight needed improvement. For example, O'Connor noted that Slight "needs to pay more attention to neatness and accuracy"; that he had good job knowledge but there was "room for improvement"; that he was often late and "forgets to punch in and out"; and although Slight gets the job done, "sometimes the finished product has rough edges." O'Connor also noted, as specific areas of needed improvement, "quality, very easily distracted, forgetful, timekeeping and organization." O'Connor's recommendation was that Slight learn to "concentrate on one thing at a time". O'Connor admitted that, in conjunction with this evaluation, he fought to get Slight a $1 raise in his hourly pay.

There is no dispute that, during the period covered by Slight's August 2001 evaluation, he worked closely with O'Connor who was present at Canal Street virtually every day to supervise Slight's performance. In contrast, the period from October 2001 to March, during which all of the examples of Slight's "incompetence" occurred, coincided with O'Connor's extended absence from Canal Street coordinating the warehouse relocation. O'Connor explained that, because Slight was essentially unsupervised during this period, his weaknesses and job deficiencies became more apparent and troublesome. O'Connor also explained that he did not discipline or fire Slight despite all of these problems because Slight was the only handyman he had and O'Connor couldn't afford to lose him until he had the time to find a replacement. Significantly, O'Connor terminated Slight shortly after he hired Motiram Jagdeo as a handyman in early March.

B. *Analysis and Conclusions*

1. Section 8(a)(1) Allegations

The complaint alleges, at paragraph 7(a), that O'Connor promised employees benefits if they did not join the Union during the breakfast meeting in the maintenance office that occurred in early October. The General Counsel relies primarily upon Piche's testimony about this incident. While there appears to be no dispute that O'Connor told the employees that they would not be in the Union, there is a dispute as to whether any promises were made to encourage employees to refrain from joining the Union. After first testifying that all O'Connor said was that he didn't want his maintenance men in the Union, Piche was led to say that O'Connor told the employees that "the company would do good for us." Slight, who was not even asked about this meeting by General Counsel, did not corroborate Piche's recollection. Instead, he confused this conversation with the later conversation in the truck and claimed that O'Connor told the employees he would give them a $1 raise instead of the $.25 they would get with the Union. I do not credit either Piche or Slight regarding this meeting. As to this allegation, I found the testimony of O'Connor and Lal far more credible. They were consistent in testifying that O'Connor did no more than relay the information he had received from Northrup about the Union's organizing effort and express his belief, mistaken as it was, that the employees in his department would not be included because the Union was a textile Union. This hardly amounts to a promise of benefits that would violate the Act. Accordingly, I shall recommend that paragraph 7(a) be dismissed for failure of proof.

Paragraphs 7 (b) and (c) of the complaint relate to the conversation that allegedly occurred in the truck during one of the trips from Walker Street to Woodbridge. There are three versions of this event: (1) Slight's testimony that O'Connor, in discussing the Union with Hooks, said that the Union would not give the employees the $1 raise that he gave and that O'Connor at one point asked Slight if he was in the Union; (2) O'Connor's absolute denial that he was ever in the truck with both Slight and Hooks and his assertion that no such conversation occurred; and (3) Hooks testimony which contradicted both Slight and O'Connor. Although there is the possibility that Hooks bore some residual hostility toward the Respondent over its unwillingness to agree to his reasonable proposal to accept a transfer to the new warehouse, I found him the most credible witness of the three. He had nothing to gain from the outcome of these proceedings and appeared to have accepted his termination with grace and dignity. While I found his testimony about seeing Slight's picture in the *Nor'Easter* unbelievable, his testimony about the conversation in the truck was credible.[14]

Based on Hooks credible testimony, I find that O'Connor did not promise employees a wage increase if they did not join a Union. According to Hooks, during their conversation in the truck, O'Connor merely expressed his opinion that a union would not be in the best interests of anyone. Such a vague statement of opinion does not rise to the level of a violation of the Act. Hooks testified that the only time he and O'Connor discussed wages in connection with the Union, no employees were present. Moreover, even in this conversation between two supervisors, O'Connor merely pointed out the difference between the terms under which a unionized segment of the Respondent's workforce worked and those at the Canal Street stores. Accordingly, I find that the General Counsel has not met his burden of proof as to paragraph 7(c) of the complaint.

[14] It is axiomatic that a witness may be believed as to some but not all of his testimony. See *Farmer Bros. Co.,* 303 NLRB 638, 649 (1991).

Based on Hooks testimony, I find that O'Connor did say to Slight, at one point during his conversation with Hooks, "you're not joining the Union, right?" Such a question, which invites an employee to reveal his union sympathies, amounts to unlawful interrogation. Although Slight had signed a union authorization card, and may have distributed cards to other employees, he was not an open and notorious union supporter. Moreover, the question came from Slight's direct boss who had hired him, given him a raise and had the power to terminate him. The fact that Slight did not answer the question but "danced around it" is further evidence of the coercive nature of the interrogation. Accordingly, applying the totality of circumstances test adopted by the Board in *Sunnyvale Medical Clinic,*[15] I find that the Respondent violated Section 8(a)(1) of the Act through this instance of interrogation.

The General Counsel amended the complaint at the hearing to allege that the Respondent also violated Section 8(a)(1) of the Act when O'Connor allegedly instructed employees not to wear Union insignia. Although the General Counsel alleged that this violation occurred on an unknown date in October, the evidence in the record places this incident in late November, shortly before the election. Hassinger testified that Union hats were not passed out until two days before the election and Piche testified that he had the particular conversation on which the allegation is based on the day of the election. Piche testified, only after having his memory refreshed with his affidavit, that O'Connor told him that he shouldn't wear the union hat or badges. According to Piche, he was alone with O'Connor when this conversation occurred. Piche testified that he told O'Connor that Store Manager Northrup issued a memo giving employees permission to wear Union hats and other insignia on the day of the election. O'Connor apparently did not pursue the matter. Although Piche was unable to recall if he was wearing a Union hat at the time of this conversation, he and Slight did wear their Union hats and insignia on a regular basis without interference. As previously noted, O'Connor denied telling Slight that he couldn't wear a Union hat, but did not deny giving such an instruction to Piche.

Piche's testimony, elicited as it was through leading questions and with the assistance of his pre-trial affidavit, was not particularly reliable. His apparent inability to recall this and other conversations and his seeming reluctance to support the General Counsel's case may very well have been a result of the General Counsel's refusal to issue a complaint with respect to his discharge. Piche's unwillingness to stand by his prior testimony when he no longer had anything to gain from it suggests that his prior statements may have been shaded to aid his cause. Because of my doubts about his overall credibility, I can not rely on Piche's testimony to find a violation. I also note that O'Connor's alleged instruction to Piche not to wear union hats goes against the weight of the evidence which indicates that employees were free to wear such insignia and otherwise show their support for the Union prior to the election. Why would O'Connor single out one employee when others were openly wearing such insignia? It does not make sense. Accordingly, I shall recommend that this allegation be dismissed.[16]

2. Slight's Discharge

The test for determining whether the Respondent's discharge of Slight violated Section 8(a)(3) of the Act is the Board's *Wright Line* test.[17] Under this test, the General Counsel bears

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[15] 277 NLRB 1217 (1985).

[16] Although Slight "corroborated" Piche's testimony, I did not find Slight's testimony as to this conversation credible. Piche testified that Slight was not present when O'Connor allegedly instructed him not to wear the Union hat.

[17] *Wright Line,* 251 NLRB 1083 (1980), enfd. 622 F.2d 899 (1st Cir. 1980), cert. denied 455 U.S. 988 (1982). See also *Manno Electric,* 321 NLRB 278, 280, fn. 12 (1996).

the initial burden of proving by a preponderance of the evidence that protected activity was a motivating factor in the employer's decision to terminate Slight. To meet this burden, the General Counsel must offer evidence of union or other protected activity, employer knowledge of this activity, and the existence of anti-union animus that motivated the employer to take the action it did. The Board has recognized that direct evidence of an unlawful motivation is rarely available. The General Counsel may meet his burden through circumstantial evidence, such as timing and disparate treatment, from which an unlawful motive may be inferred. See *Naomi Knitting Plant,* 328 NLRB 1279 (1999) and cases cited therein. However, mere suspicion is not enough to sustain the General Counsel's burden. *King's Terrace Nursing Home,* 229 NLRB 1180 (1977). See also *New Otani Hotel & Garden,* 325 NLRB 928 (1998); *Alexian Bros. Medical Center,* 307 NLRB 389 (1992). If the General Counsel meets his burden, then the burden shifts to the respondent to prove, by a preponderance of the evidence, that it would have taken the same action, or made the same decision, even in the absence of protected activity. To meet its burden, a respondent simply has to show that it "possessed a good-faith belief (e.g. not one that was the result of a discriminatory failure to investigate) that [the employee] engaged in misconduct and that that belief was the motivating cause of the discharge." *Doctor's Hospital of Staten Island, Inc.,* 325 NLRB 730, fn. 3 (1998). See also *Rockwell Automation/Dodge,* 330 NLRB 547, 549-551 (2000).

There is no question that Slight engaged in protected union activities by signing a card and assisting the Union during the organizing campaign, wearing a Union hat at work and appearing in the Union publication expressing his views in favor of union representation. Although O'Connor conceded being aware that Slight wore the Union hat, he denied knowledge with respect to any other union activity on the part of Slight. In particular, O'Connor denied being aware of Slight's appearance in the *Nor'Easter* before making the decision to terminate him. The General Counsel and the Charging Party rely on Slight's testimony that Lal, O'Connor's assistant manager, referred to Slight's appearance in the *Nor'Easter* shortly before he was terminated, as well as the pervasive nature of the publication's distribution, to establish that O'Connor had knowledge of it at the relevant time. The General Counsel also cites Hooks' testimony, which I have already rejected, that he saw this issue of the *Nor'Easter,* and Hassinger's testimony that she handed a copy of this issue to admitted supervisor Duhaney. On the issue of animus, the General Counsel and the Charging Party rely on the Section 8(a)(1) allegations, all but one of which I have found to lack merit, and the allegedly "intensive anti-union campaign" conducted by the Respondent before the election. It is argued that this evidence, plus circumstances such as timing and the allegedly weak basis for O'Connor's decision to terminate Slight, support an inference that Slight's protected union activity were a motivating factor in his termination.

Having considered all of the evidence in the record and the relative credibility of the witnesses, I must respectfully disagree with the General Counsel and the Charging Party. Although, at first blush, Slight's apparently sudden termination within a month of his appearance in a union newsletter of wide circulation appears suspect, closer scrutiny convinces me that his termination was long overdue and had nothing to do with his protected activity. The "suspect" timing was also adequately explained by O'Connor, whom I found to be a more credible witness than Slight.

I note initially that neither O'Connor nor Slight impressed me as an entirely truthful witness. As noted previously, O'Connor's denial that he was ever present in the truck with both Slight and Hooks was contradicted by the more credible Hooks. In addition, his denial of any knowledge that the Respondent took a position opposed to the Union during the organizing drive is not believable. O'Connor also professed difficulty remembering dates and details of events which undermined his reliability as a witness. Nevertheless, he was a model of candor

when compared to Slight. Slight's overall demeanor on the witness stand, including his evasiveness and argumentativeness with counsel, his tendency to exaggerate and blame others for everything that happened, and the frequent self-serving editorial comments when answering simple questions, convinced me that his testimony as a whole was unworthy of belief. At the same time, even while attempting to shade all his answers to support his belief that he was fired because of his appearance in the *Nor'Easter,* he admitted to being responsible for many of the acts of incompetence cited by O'Connor. For example, he admitted taking down the loft even though O'Connor only told him to take down the basketball hoop; he admitted fixing the display lights, causing the lights on the first floor to dim or go out, even though he was told by O'Connor not to; he admitted disrupting telephone, cable and electrical wires when he knocked down the wall to prepare space for the lunch room;[18] and he admitted loaning the ladder to the contractor without taking any steps to ensure its return.

Because I do not credit Slight's testimony, I can not rely on his testimony that Lal asked him about the *Nor'Easter* as a basis for finding knowledge.[19] Even assuming this issue of the *Nor'Easter* was prevalent throughout the store and had been seen by supervisor Duhaney, this is not enough to support an inference that O'Connor, the decision maker, had seen it. Because O'Connor was absent from the Canal Street location 90-95% of his time during this period, he had very little opportunity to see it. Accordingly, I credit his denial of knowledge as to this aspect of Slight's protected activity.

Even assuming the General Counsel had offered sufficient evidence of knowledge, his case would fail on the question of animus. The campaign literature distributed by the Respondent before the election contained no threats, promises of benefits, or other coercive statements. Such innocuous campaign literature, without more, does not support an inference that the termination of an employee more than three month's later was motivated by anti-union considerations. See *Holo-KromeCo. v. NLRB,* 907 F.2d 1343 (2d Cir. 1990). Cf. *Norton Audubon Hospital,* 338 NLRB No. 34 (Sept. 30, 2002); *Lancaster Fairfield Community Hospital,* 311 NLRB 401, 402 (1993). Moreover, regardless of the allegedly anti-union position taken by the Respondent before the election, there is no dispute that, upon the Union's certification as its employees' representative, the Respondent complied with its obligations under the act and reached a relatively speedy agreement on a first collective-bargaining agreement. This is hardly the conduct of an employer vehemently opposed to the unionization of its employees.

The only true evidence of animus remaining is the lone act of interrogation by O'Connor, which was directed at Slight but occurred before the election, three months before his termination. Although the Board normally finds such independent violations of the Act strong evidence of anti-union animus, here this incident was superseded by several acts of incompetence on Slight's part which led up to his termination. Under the circumstances here, I find that it is these acts, rather than any lingering hostility toward the Union on O'Connor's part which motivated the decision to terminate Slight.

The General Counsel and the Charging Party make a strong argument that the circumstances surrounding Slight's discharge establish the unlawful motivation. For example,

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[18] In these last two incidents, Slight attempted to shift the blame for his carelessness to the absent Northrup. Even assuming Northrup told Slight to do these tasks, countermanding whatever instructions he was given by O'Connor, Northrup certainly could not have authorized Slight to perform the tasks in such a careless or reckless manner as to cause more problems than he was asked to fix.

[19] I also found Lal to be a generally credible witness.

the fact that Slight was not discharged until after he appeared in the *Nor'easter,* despite all of the problems O'Connor had with him before then, is suspect. However, I credit O'Connor's explanation that he was unable to terminate Slight earlier because Slight was the only handyman at the Canal Street facilities during O'Connor's extended absence from that location. O'Connor had to make do with Slight's incompetent performance until he was able to find a replacement. I find that the timing of Slight's discharge has more to do with the hiring of Jagdeo than it does with the publication and distribution of the *Nor'Easter.* The fact that O'Connor prepared two separation notices, with different final evaluations, also raises a suspicion regarding the true motive behind the discharge. However, I accept O'Connor explanation for his action in this regard. Had O'Connor truly been attempting to conceal a discriminatory motive for his decision it is unlikely he would have placed both versions of the separation notice in Slight's file. In addition, the two separation notices are not entirely inconsistent, apart from the employee evaluation sections. In both forms, it is clear that Slight was being terminated for a pattern of incompetence which culminated in his inability to keep track of the maintenance department's tools. The second separation notice merely provides a more detailed explanation for O'Connor's vague remarks on the first separation notice.

Finally, the General Counsel and the Charging Party suggest that the final incident which precipitated Slight's discharge was a set–up, that O'Connor asked Slight about the tools knowing he would not be able to find them in order to create a pretext for discharge. Had these events occurred in isolation, I might be more inclined to agree with counsel. However, Slight's inability to find the drill/screw gun and his failure to make sure the contractor returned the borrowed ladder were merely the culmination of conduct evidencing Slight's carelessness, lack of attention to detail, failure to follow instructions and similar behavior that had been noted by O'Connor from the time of Slight's first evaluation in August 2001. O'Connor's more credible testimony and the other evidence supporting it, including admissions by Slight, convince me that the motivating factor behind the discharge was the events of March 12 and not any protected activity engaged in by Slight. Accordingly, because I find that the General Counsel has not met his burden under *Wright Line,* supra, I shall recommend dismissal of this allegation of the complaint.

Even assuming arguendo that the General Counsel met his burden, I would find that the Respondent, through the testimony of O'Connor and the documented and essentially undisputed incidents of incompetence, has successfully rebutted the General Counsel's case. The Respondent has met its burden of establishing, by a preponderance of the evidence, that Slight would have been discharged even in the absence of protected activity because of his overall poor job performance during the period of O'Connor's preoccupation with the warehouse move. Thus, I would reach the same conclusion and recommend that the complaint be dismissed to the extent it alleges that Slight's discharge violated Section 8(a)(1) and (3) of the Act. See *Rockwell Automation/Dodge,* supra.

Conclusions of Law

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent, through O'Connor's interrogation of Slight regarding his union sympathies, which occurred sometime in November 2001, engaged in an unfair labor practice affecting commerce within the meaning of Section 8(a)(1) of the Act.

4. The Respondent has not engaged in any other unfair labor practices as alleged in the complaint.

Remedy

The only violation I have found in this case involves a single incident of interrogation occurring before an election in which the Union prevailed and was certified. Since that time, the Respondent has completed negotiations with the Union and entered into a collective-bargaining agreement. The employee who was interrogated, Slight, has been terminated and I have found that this termination did not violate the Act. There is no evidence that any other employees were aware of his unfair labor practice. Under the circumstances here, I shall not recommend a remedial order for such an isolated violation. The policies of the Act have been satisfactorily effectuated by the Union's victory in the election, which post-dated the unlawful conduct, and by the execution of a collective-bargaining agreement giving employees additional protections. This is a much more effective vindication of employee rights than the posting of a notice for 60 days. No additional remedial relief is necessary. See *NLRB v. Pilot Freight Carriers,* 558 F.2d 205, 214 (4th Cir. 1977), cert. denied 434 U.S. 1011 (1978); *Thermalloy Corp.,* 213 NLRB 129, 133 (1974).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[20]

ORDER

The complaint is dismissed.

Dated, Washington, D.C.

Michael A. Marcionese
Administrative Law Judge

[20] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.